(2)

No. 06-364

FILED
OCT 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BINNEY & SMITH, INC., THE FOLLETT CORPORATION, CAROL A. MIGLIACCIO, NIC ZAWARSKI AND SONS DEVELOPERS INC., DANIEL O. LICHTENWALNER, AND JOAN B. LICHTENWALNER IN OPPOSITION

David F. B. Smith
Counsel of Record
Ryberg and Smith L.L.P
1054 Thirty-first Street,
N.W. Suite 300
Washington, DC 20007
(202) 333-4000

Counsel for Binney & Smith, Inc., the Follett Corporation, and Carol A. Migliaccio

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

Darryl J. May
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street
Philadelphia, PA
19103-7599
(215) 864-8103

Counsel for Binney & Smith, Inc., Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner

Blair H. Granger
Blair H. Granger & Associates, P.C.
1800 E. Lancaster Avenue
Paoli, PA 19301

Counsel for Binney & Smith, Inc., the Follett Corporation, and Carol A. Migliaccio

Counter-Statement of the Questions Presented

1) Did the Court of Appeals properly find that Petitioner, the Delaware Nation, failed to make out the elements of an Indian Nonintercourse Act claim, thereby negating the need to determine whether the Act applies to land granted in fee to an individual Indian?

2) Did the Court of Appeals properly find that aboriginal title was extinguished by the Province of Pennsylvania?

List of Parties and Rule 29.6 Statement

The petitioner is the Delaware Nation, a federally recognized Indian tribe. Respondents are Governor Edward G. Rendell, the County of Northampton, Pennsylvania, J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth, Nick R. Sabatine, the Township of Forks, Pennsylvania, John Ackerman, David Kolb, Donald H. Miller, David W. Hoff, Henning Holmgaard, Binney & Smith, Inc., the Follett Corporation, Robert Aerni, Mary Ann Aerni, Audrey Bauman, Daniel O. Lichtenwalner, Joan B. Lichtenwalner, Carol A. Migliaccio, Jack Reese, Jean Reese, Gail N. Roberts, Carl W. Roberts, Warren F. Werkheiser, Warren Neill Werkheiser, Nic Zawarski and Sons Developers, Inc., Mark Sampson, and Cathy Sampson.

The parent corporation of respondent Binney & Smith, Inc. is Hallmark Cards, Incorporated, which owns 100 percent of H.A., Inc., which in turn owns 100 percent of Binney & Smith, Inc. No publicly held company owns 10 percent or more of the stock of Hallmark Cards, Incorporated.

Respondent Follett Corporation has no parent corporation, and no publicly held company owns 10 percent or more of the stock of the Follett Corporation.

Respondent Nic Zawarski and Sons Developers, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of the stock of Nic Zawarski and Sons Developers, Inc.

Table of Contents

Page

Counter-Statement of the Question Presented i

List of Parties and Rule 29.6 Statement ii

Opinions Below 1

Jurisdiction 1

Statement 2

Argument:

I. The application of the Nonintercourse Act of 1799 does not present a question of federal law deserving the Court's attention 4

II. The determination by the court of appeals below that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title does not present a question of federal law deserving the Court's attention 11

A. Petitioner's aboriginal title to the Tatamy parcel was extinguished by the Proprietaries of Pennsylvania, exercising the sovereign power conveyed by the Charter of 1681 11

B. Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title 12

Table of Contents–Continued

Page

C. The Indian burden of proof statute, 25 U.S.C. § 194, is irrelevant to Petitioner's waiver 13

D. In any case, the Proprietaries of Pennsylvania had sovereign authority to extinguish aboriginal title 14

Conclusion 18

Table of Authorities

Cases: Page

Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 6

City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) 17

Howard v. Ingersoll, 54 U.S. 381 (1852) 15

Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba, 118 N.M. 550 (N.M. 1994) 6

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) 15

Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995), *reversed on other grounds*, 108 F.3d 820 (8th Cir. 1997), *reversed*, 524 U.S. 103 (1998) 6

Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1358-59 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) 6

Martin v. Waddell, 41 U.S. 367 (1842) 15

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 5

San Xavier Developmental Authority v. Charles, 237 F.3d 1149 (9th Cir. 2001) 6

Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039 (5th Cir. 1996) 5

Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958) 6

United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938) 6

Table of Authorities–Continued

	Page
United States v. Candelaria, 271 U.S. 432 (1926)	5
United States v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995), *reversed on other grounds*, 106 F.3d 130 (6th Cir. 1997)	6
United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941)	11
Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)	13
Statutes:	
25 U.S.C. § 177	4
25 U.S.C. § 194	13
28 U.S.C. § 1254(1)	2
Nonintercourse Act of 1799, Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746	4
Treaty of Greeneville of August 3, 1795, 7 Stat. 49 (1795)	17
Other:	
IV Minutes of the Provincial Council (1742)	8
William A. Hunter, Moses (Tunda) Tatamy, Delaware Indian Diplomat (Pennsylvania Historical and Museum Commission 1974)	2
James H. Merrell, Into the American Woods (1999)	2

IN THE
SUPREME COURT OF THE UNITED STATES
No. 06-364

DELAWARE NATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BINNEY & SMITH, INC., THE FOLLETT CORPORATION, CAROL A. MIGLIACCIO, NIC ZAWARSKI AND SONS DEVELOPERS INC., DANIEL O. LICHTENWALNER, AND JOAN B. LICHTENWALNER IN OPPOSITION

Opinions Below

The opinion of the district court was entered on November 30, 2005 and unreported. The opinion of the Court of Appeals was entered on May 4, 2006 and is reported at 446 F.3d 410. The Court of Appeals denied rehearing on June 15, 2006.

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 2006. A petition for rehearing was denied on

June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement

Petitioner, the Delaware Nation, is a federally recognized Indian tribe now located in Oklahoma. In the courts below, Petitioner alleged that the Walking Purchase of 1737, a well-known event in Pennsylvania history, failed to extinguish the tribe's aboriginal title to approximately 1,200 square miles of eastern Pennsylvania, including the land at issue in this suit. The land at issue consists of 315 acres of land purchased in 1741 by an individual Indian, Tatamy, from the Proprietors of Pennsylvania—or "Proprietaries" in the usage of the time. Petitioner also claimed to be the fee owner of the 315-acre Tatamy parcel, even though the 1741 patent from the Proprietaries of Pennsylvania granting the land to Tatamy was clearly on its face a grant to an individual, rather than to a tribe. *See* Pet. App. 5a-7a.

In 1737, Thomas Penn, in his capacity as successor to his father William Penn as the Proprietor of Pennsylvania, extinguished the Petitioner's aboriginal title to approximately 1,200 square miles of eastern Pennsylvania through the infamous Walking Purchase. *See* Pet. App. 4a-5a. The 315-acre parcel claimed by Petitioner was part of the land included in the Walking Purchase. After the Walking Purchase, the Proprietaries sold the 315 acre parcel to an individual member of the Delaware tribe, Tatamy, who was a well-known and respected figure. *See* Pet. App. 5a; *see also* James H. Merrell, INTO THE AMERICAN WOODS (1999) at 88 & 292 (Tatamy was one of a few Delaware Indians who ultimately became a Christian and "to one degree or another accepted European ways."); William A. Hunter, *Moses (Tunda) Tatamy, Delaware Indian Diplomat*

(Pennsylvania Historical and Museum Commission 1974). The first patent to Tatamy, dated April 28, 1738, was cancelled and replaced by the second patent, dated January 22, 1741. The 1741 Patent granted the land in fee simple to "Tatamy and his heirs and assigns." *See* Pet. App. 5a-6a; Complaint, Exhibit F (1741 Patent). In a deed recorded on March 12, 1803, Edward Shipper, as Executor of the Estate of William Allen, conveyed the 315-acre parcel to the Strecher family, reciting an agreement between Allen and the Strechers forty years prior to Allen's death.[1] The record below does not show how Allen acquired Tatamy's title.[2]

The landowner defendants, respondents here, or their predecessors in title have held undisputed title to and possession of the 315 acres claimed by Petitioner for roughly 200 years, until this present suit was filed. The landowner defendants—homeowners and three businesses—are innocent purchasers who had no involvement in any of the events that led to the Delaware Nation's departure from Pennsylvania during colonial times.

In the district court the respondents moved to dismiss for failure to state a claim.[3] Following briefing and oral

---

1 *See* Pet. App. 6a-7a. William Allen was the Chief Justice of Pennsylvania and vouched for Tatamy as part of the process by which Tatamy received his patent. *See* Complaint, Exhibit B.

2 *See* Pet. App. 7a. The historian James Merrill states that "Tatamy sold his land sometime before 14 February 1757." *See* James H. Merrell, INTO THE AMERICAN WOODS (1999) at 429-30 n.152.

3 Respondents Binney & Smith, Inc., the Follett Corporation, Daniel O. and Joan B. Lichtenwalner, Carol A. Migliaccio, and Nic Zawarski and Sons Developers Inc. ("the Binney & Smith Defendants") although not related parties, have counsel in common

argument, the district court, on November 30, 2004, granted the motions to dismiss. On December 1, 2004, it entered final judgment on its Order. Plaintiff timely appealed.

On appeal, the court of appeals affirmed the dismissal, holding that any aboriginal rights held by the Delaware Nation to the claimed land were extinguished by the Walking Purchase of 1737, and that the Delaware Nation does not hold fee title to the claimed land.

Argument

The decision below is correct. It does not present a question of federal law deserving the Court's attention. Furthermore, the decision below does not conflict with any decision of this Court or any court of appeals. Therefore further review is not warranted.

I. The application of the Nonintercourse Act of 1799 does not present a question of federal law deserving the Court's attention.

Petitioner seeks review to enable this Court to consider whether the Nonintercourse Act of 1799 applied to land held in fee by an Indian tribe.[4] Resolution of that issue would be purely academic for purposes of this case, however, and would not benefit Petitioner. The court of appeals below assumed arguendo that the Act did apply to land held in fee by an Indian tribe. *See* Pet. App. 13a-14a.

---

and filed a joint motion to dismiss in the district court, and have continued to file joint briefs in the court of appeals and in this Court.

[4] Nonintercourse Act of 1799, Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746. The current version of the Nonintercourse Act is codified at 25 U.S.C. § 177.

The court of appeals below then determined that the applicability of the Nonintercourse Act was irrelevant because Petitioner did not own the land it claims in fee. Instead, the land was owned by an individual, Tatamy. The court of appeals stated:

> Even assuming that the Nonintercourse Act applies to land reacquired by an Indian tribe in fee after the sovereign extinguished its aboriginal rights to land—an issue which appears to be unsettled, but which is not necessary for us to decide here—the Delaware Nation's claim must fail because it is clear that the Proprietors granted Tatamy's Place to Chief Tatamy in his individual capacity, and not as an agent of the tribe.

See Pet. App. 13a-14a. Consequently, resolution of the question whether the Nonintercourse Act of 1799 applies to land reacquired by a tribe in fee would not change the result in this case. The decision below would be affirmed whether or not the Act applies, because the court of appeals determined that "the land in question is not 'tribal' in any sense of that word." *See* Pet. App. 17a. Consideration of the question whether the Nonintercourse Act of 1799 applies to land reacquired by a tribe in fee, if it is to occur at all, should await a case in which the resolution of the question would make a difference to the outcome.[5]

---

[5] Courts, including this Court, have indicated that the Nonintercourse Act prohibits a tribe from alienating or encumbering land held by the tribe in fee simple. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 244-46 (1985)(Nonintercourse Act applied to land held in fee by Pueblos in New Mexico); *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926) (Nonintercourse Act applied to land held in fee by Pueblos in New Mexico); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d

In truth, Petitioner seeks to overturn the court of appeals' determination that the "land in question is not tribal." That is not, however, the question for review that Petitioner posed. Furthermore, the court of appeals below was correct when it concluded that the Delaware Nation had no fee title to the Tatamy parcel. The 1741 Patent clearly grants the land in fee simple to "Tatamy and his heirs and assigns," rather than to any Indian tribe. *See* Complaint, Exhibit F (1741 Patent). Petitioner conceded

---

1039, 1045 (5th Cir. 1996)(Nonintercourse Act protects land purchased by a tribe); *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 887, 893 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958) (Nonintercourse Act applies to land purchased by a tribe); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938)(same); *Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba*, 118 N.M. 550, 883 P. 2d 136 (N.M. 1994)(same). In *Lummi Indian Tribe v. Whatcom County*, the Ninth Circuit held that "parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act." *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358-59 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994); *see also San Xavier Developmental Authority v. Charles*, 237 F.3d 1149 (9th Cir. 2001)(Nonintercourse Act applies only to tribal land, not allotted land); *Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995), *reversed on other grounds*, 108 F.3d 820 (8th Cir. 1997)(court finds it unnecessary to consider any issue related to the Nonintercourse Act), *reversed*, 524 U.S. 103 (1998)(Court finds it unnecessary to consider any issue related to the Nonintercourse Act); *United States v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *reversed on other grounds*, 106 F.3d 130 (6th Cir. 1997)(court did not consider Nonintercourse Act), *vacated for consideration in light of Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). In *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), this Court found it unnecessary to consider whether the Nonintercourse Act applied to land rendered alienable by Congress and later reacquired by a tribe in fee. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

that the 1741 Patent represents a grant to Tatamy in fee simple. *See* Complaint, ¶ 45. The 1741 Patent recites that the land was granted to Tatamy "for a Settlement and Place of Abode for him and his children under a certain Quit rent and other reservations, Conditions and Limitations." *See* Complaint, Exhibit F (1741 Patent). The 1741 Patent provides that Tatamy was to pay one-half penny sterling for every acre annually as quitrent, and reserves a right of reentry on behalf of the Proprietors to take possession of the land to secure the payment of the quitrent. The inclusion of a provision for quitrent demonstrates that the 1741 Patent to Tatamy was intended by the Proprietaries as a typical fee simple grant to an individual rather than as a tribal grant.

The 1741 Patent also recites that Tatamy and his heirs and assigns held the land "in free and common Soccage by fealty only in lieu of all other services." It then recites that Tatamy paid 48 pounds, sixteen shillings, sixpence to receive a fee simple grant to the 315 acre parcel. *See* Complaint, Exhibit F (1741 Patent). These provisions in the 1741 Patent all establish that the 1741 Patent was a grant to an individual, rather than to a tribe.[6]

---

[6] Petitioner apparently continues to rely upon an earlier patent covering the same the 315 acre parcel issued to Tatamy in 1738. *See* Pet. at 6. The 1741 Patent states expressly that the 1738 Patent was cancelled by the 1741 Patent. *See* Complaint, Exhibit F (1741 Patent). Petitioner therefore cannot assert any claim under the 1738 Patent. In any event, like the 1741 Patent, the 1738 Patent is also on its face a grant to an individual, rather than to a tribe. *See* Complaint, Exhibit E (1738 Patent). None of the provisions in the 1738 Patent gives any indication that the grant was intended by the Proprietaries to constitute a grant to a tribe. The 1738 Patent provided that the grant was to Tatamy for his natural life and the lives of his child or children "to all generations," but also provided that if Tatamy died without any children surviving, then the land would revert to the Proprietaries. The 1738 Patent also provided that the land would revert to the Proprietaries if Tatamy or his heirs should "desert" the land for a year.

Certainly none of its provisions gives any indication that the grant was intended by the Proprietaries to constitute a grant to a tribe.

The court of appeals' construction of the 1741 Patent is confirmed by a ruling of the Commonwealth's Board of Petition made on November 20, 1742 in response to a petition by Tatamy and others. Shortly after a July 12, 1742 treaty between Pennsylvania and the tribes of the Six Nations that included a provision directing the Delaware tribe to leave the area, Tatamy and several other Delaware Indians sought to stay behind when the Delaware tribe moved west in compliance with the 1742 treaty. The Governor of Pennsylvania submitted Tatamy's petition and the others to the Board of Petition. The Board's minutes recite that Tatamy and the others, "having embraced the Christian religion and attained some degree of knowledge therein, they are desirous of living under the same Laws with the English, and praying that some place might be allotted them where they may live in the Enjoyment of the same Religion & Laws with them." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 624. The Board, however, initially determined that the real purpose of the petitions "was to evade the force of the Injunctions laid on them at the said Treaty by the Chiefs of the Six Nations, who had commanded all the Delaware Indians without exception to remove from the Lands on Delaware

---

The 1738 Patent also contained a quitrent clause providing that Tatamy was to pay one-half penny sterling for every acre annually as quitrent, and if the quitrent was not paid within the time allowed, the land would revert to the Proprietaries. *See* Complaint, Exhibit E (1738 Patent). These provisions in the 1738 Patent providing for reversion of title if no children survive and if the land is abandoned, and providing for reentry for failure to pay quitrent, are completely inconsistent with a grant of tribal title. Therefore, there is nothing about the 1738 Patent to suggest that the 1741 Patent was intended in any way to be a tribal grant.

where they then dwelt, and which their ancestors had twice sold to the Proprietors, back to Wyomin or Shamokin." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 624-25. The Board then rejected the petitions, stating that "it is by no means fit to comply with the general Pray'r of the said Petition, for that it might not only be resented by the six Nations, but be a means of reviving the Dissentions lately fomented by the Delawares." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 625.

When Tatamy reminded the Board that he "was lawfully possessed of three hundred acres of Land by a Grant from the Proprietor; and that he was desirous of continuing to live there in Peace and friendship with the English," and another Indian named Captain John made a representation that he would similarly buy land if permitted, the Board then ruled that Tatamy and Captain John alone could stay behind. "But if these two men [Tatamy and Captain John] could obtain the consent of the six Nations for them to remain amongst the English, it might be granted them." IV MINUTES OF THE PROVINCIAL COUNCIL, at 625. The Board made it clear, however, that Tatamy's and Captain John's right to remain did not extend to any Delaware Indians other than "themselves and their proper families dwelling in the same Houses with them." The Board stated:

> And they [Tatamy and Captain John] were to understand that the other Petitioners were by no means to be included in this permission, nor any other of the Delaware Indians, whom they called their Cousins, nor any besides

> themselves and their proper families dwelling in the same Houses with them.[7]

These actions by the Board of Petition in November of 1742, coming so soon after the 1741 Patent to Tatamy and the July 1742 treaty with the Six Nations, demonstrate that the 1741 Patent did not constitute a grant to a tribe. The 1742 decision of the Board of Petition made it absolutely clear that the Delaware Indians, apart from Tatamy and Captain John and their immediate families, had no right to remain on any land at the Forks. The 1741 Patent was clearly a grant to Tatamy the individual, not to the Delaware tribe.

In sum, the court of appeals below assumed arguendo that the Nonintercourse Act of 1799 applied to land as to which aboriginal title is extinguished and that is subsequently reacquired in fee by an Indian tribe. The court determined, however, that Petitioner did not own the Tatamy parcel in fee. Consequently, resolution of the question whether the Nonintercourse Act applies to land to which aboriginal title is extinguished but later is reacquired in fee by an Indian tribe would not change the result in this case. This Court should not grant certiorari to review a question that has no bearing on the result in this case.

---

[7] *See* IV Minutes of the Provincial Council, at 625; *see also* William A. Hunter, *Moses (Tunda) Tatamy, Delaware Indian Diplomat* (Pennsylvania Historical and Museum Commission 1974).

II. The determination by the court of appeals below that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title does not present a question of federal law deserving the Court's attention.

Petitioner also seeks review of the determination of the court of appeals below that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title. The court of appeals below made a straightforward application of the waiver doctrine and determined that Petitioner had not presented its argument to the district court. This issue does not deserve the Court's attention.

A. Petitioner's aboriginal title to the Tatamy parcel was extinguished by the Proprietaries of Pennsylvania, exercising the sovereign power conveyed by the Charter of 1681.

The courts below correctly held that Petitioner's aboriginal title to the Tatamy parcel was extinguished by the events comprising the so-called Walking Purchase of 1737. *See* Pet. App. 11a. As a matter of well-settled law the sovereign has the absolute power to extinguish aboriginal title, by any means. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). As Justice Douglas phrased it in one of the leading cases on the extinguishment of aboriginal title: "And whether it [extinguishment of aboriginal title] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *Id.* The Proprietaries of Pennsylvania, exercising the sovereign power conveyed to them by the Charter of 1681, clearly intended to extinguish Delaware aboriginal title through

the Walking Purchase in 1737. So long as the sovereign clearly intended to extinguish aboriginal title by its actions, the means chosen by the sovereign to accomplish extinguishment are completely irrelevant to the question of whether title was in fact extinguished. *See id.*

B. Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title.

On appeal Petitioner attempted to argue, for the first time in the litigation, that William Penn and his sons, as Proprietaries of Pennsylvania under the Charter of 1681, lacked the sovereign authority to extinguish aboriginal title. Respondents argued, and the court of appeals agreed, that Petitioner had waived the argument. Respondents demonstrated that the Governor's Reply (Docket No. 94) had argued at pp. 4-5 that the Walking Purchase was valid precisely because Thomas Penn was sovereign. Indeed, the Governor's Reply contained a footnote 1 that explicitly stated:

> The Penns' status as sovereign, with the power to extinguish aboriginal title, *is of course undisputed. See* Compl. at ¶ ¶ 28-37; opp. at 5-6.

Governor's Reply, p. 4 n.1 (emphasis added). Petitioner said not one word in response to this unambiguous statement. Petitioner did not even attempt to argue against the Penns' status as sovereign. Rather, in a section of the Sur-Reply captioned "The Delaware Nation Was Never Dispossessed of Tatamy's Place," Petitioner argued only that the Walking Purchase was fraudulent, and that "aboriginal title cannot be validly extinguished through fraud and chicanery." *See* Plaintiff's Sur-Reply in Opposition to Defendants' Motion to Dismiss (Docket No. 104), p. 2.

Petitioner's answers to the district court's written questions to all parties (Docket No. 114) further established that this argument was not made below. In response to Question 5(b), "did the Walking Purchase of 1737 extinguish the Delaware Nation's aboriginal title?" Petitioner responded: "Because Indian title can only be extinguished by the sovereign, the Walking Purchase could not have validly extinguished Indian title to Tatamy's Place where the Walking Purchase was the product of fraud. Fraud is not a valid form of extinguishment." Had Petitioner intended to raise Thomas Penn's purported lack of sovereignty as an issue, one certainly would have expected it to be raised here. The complete absence of any reference to Thomas Penn's alleged lack of sovereignty, in response to the district court's question and the Governor's direct statement, establishes beyond doubt that the argument was not raised below. The court of appeals was fully justified in determining that Petitioner had waived the argument.

C. The Indian burden of proof statute, 25 U.S.C. § 194, is irrelevant to Petitioner's waiver.

Petitioner claims that the court of appeals' straightforward application of procedural waiver to its argument that the Proprietaries of Pennsylvania lacked sovereign authority to extinguish aboriginal title somehow conflicts with 25 U.S.C. § 194, which deals with the burden of proof in trials between an "Indian" and a "white person." *See* 25 U.S.C. § 194; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 658 (1979). Section 194 has no bearing on Petitioner's waiver, however. Section 194 shifts the burden of proof and the burden of persuasion in a trial from an Indian to a non-Indian once the Indian "has made out a presumption of title in himself." *See* 25 U.S.C. § 194. This case, however, was decided on a motion to dismiss under Rule 12(b)(6), in which all of Petitioner's factual allegations were presumed to be true.

Defendants established, as a matter of law, that the Proprietaries of Pennsylvania in 1737 extinguished any aboriginal title that Petitioner may have had. The burden of proof was not implicated in the decisions of the courts below.

Petitioner's argument that the Proprietaries of Pennsylvania lacked sovereign authority to extinguish aboriginal title in 1737 is a legal argument, not a factual assertion. Petitioner failed to raise the argument in a timely fashion, the court of appeals was fully justified in finding waiver, and section 194 has no bearing on the issue. Furthermore, the application of section 194 to a procedural waiver appears to be an issue that is unlikely to recur often and therefore does not deserve the Court's attention.

D. In any case, the Proprietaries of Pennsylvania had sovereign authority to extinguish aboriginal title.

There can be no doubt that the Charter of 1681, attached to the Complaint as Exhibit A and cited liberally in the Complaint, granted to William Penn and his "Heires and Assignes" as the "true and absolute Proprietarie" of Pennsylvania, the sovereign authority to extinguish aboriginal title. The Charter of 1681 represents an extensive delegation of governmental authority from the ultimate sovereign, the King of England, to William Penn and his successors as Proprietaries, authorizing the Proprietaries to govern Pennsylvania. For example, the Charter explicitly grants to the Proprietaries "full and absolute power" (1) to ordain and publish "any Laws whatsoever," (2) to "appoint and establish any Judges and Justices," (3) to divide Pennsylvania into counties, towns and boroughs, (4) to establish seaports and harbors for the importation of goods and collections of customs duties, and (5) even the power to raise armies and "make Warre." *See* Complaint, Exhibit A at A59-66. The Charter also

explicitly grants to William Penn, and his heirs and assigns, "full and absolute power, license, and authoritie" to grant land in fee simple, and binds the King of England and his successors to recognize any titles to land granted by Penn and his successors that "as to him, the said William Penn, his heires and assignee, shall seem expedient." *See* Complaint, Exhibit A.

This Court has repeatedly held that proprietary charters, such as the 1681 Charter to William Penn, conveyed to the proprietors both the sovereign power to govern and the right to convey private title to land. *See Howard v. Ingersoll*, 54 U.S. 381, 400 (1852)("In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors."); *Martin v. Waddell*, 41 U.S. 367, 412 (1842); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 580-81, 603 (1823). In construing a similar charter for New York and New Jersey, issued by Charles II to the Duke of York, the Court in *Martin v. Waddell* stated:

> [W]e can entertain no doubt as to the true construction of these letters-patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly-discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution.

See Martin v. Waddell, 41 U.S. 367, 412 (1842)(emphasis added). Petitioner's argument that William Penn and his successors were merely private landowners who "could convey fee title to others" but who lacked the authority to extinguish aboriginal title ignores the fundamental

purpose of the Charter of 1681, which was to delegate the power to govern Pennsylvania—"to stand in the place of the king"—to William Penn and his successors.[8] The Charter of 1681 granted the sovereign authority over Pennsylvania to William Penn and his successors, and the Proprietaries had full authority to extinguish aboriginal title to land in Pennsylvania.

Furthermore, Petitioner's argument proves too much because it would invalidate existing land titles to virtually all of the land in Pennsylvania, including land purchased from Native Americans by William Penn himself. It is clear from the Charter of 1681 that William Penn's successors as Proprietaries had the same authority as William Penn himself did. If, as Petitioner contends, only the King could extinguish aboriginal title to the land comprising the Walking Purchase, then William Penn could not have obtained a valid title in connection with any of the purchases that he made, either. Private individuals—without the sovereign power—simply could not extinguish aboriginal title, through purchase or otherwise. In *Johnson v. M'Intosh*, the question was whether grants made by Indian chiefs in 1773 and 1775 to "private individuals" conveyed title "that can be recognized in the Courts of the United States." *Johnson, supra*, 21 U.S. at 572. Chief Justice Marshall engaged in a lengthy inquiry in which he ultimately concluded, for

---

[8] *See Martin v. Waddell*, 41 U.S. 367, 412 (1842). The fact that proprietary charters conveyed both the power to govern as well as the power to convey private title is also illustrated by the fact that in several cases proprietors surrendered their governmental power back to the Crown while retaining their private rights. *See Martin v. Waddell*, 41 U.S. 367, 407 (1842)(New Jersey proprietors surrendered their right to govern in 1702); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 580 (1823)(Carolina proprietor "Lord Carteret surrendered his interest in the government, but retained his title to the soil.").

the Court, that "such purchases are opposed by the soundest principles of wisdom and national policy," and that the title obtained by the plaintiffs, whether or not fairly purchased, was not valid title. *Id.* at 604. Thus, if William Penn was not the sovereign—if he was, in effect, a "private individual," then his purchases were of no greater viability then those of the plaintiffs in *Johnson v. M'Intosh,* and (apart from the effect of the Treaty of Greeneville of August 3, 1795, 7 Stat. 49) significant portions of Pennsylvania would be subject to claims of unextinguished aboriginal title by those tribes that sold to William Penn.[9] But it is far too late in the day for Petitioner to argue that William Penn and his successors lacked the sovereign authority to extinguish aboriginal title to land in colonial Pennsylvania prior to July 4, 1776. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.,* 544 U.S. 197, 221 (2005) (long lapse of time and attendant dramatic changes in the character of the land precludes Indian tribe from recovering possession of land).

In sum, the court of appeals below correctly concluded, in a straightforward application of the principles of procedural waiver, that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title. In any event, it is clear that the Proprietaries of Pennsylvania had sovereign authority to extinguish aboriginal title.

---

[9] Respondents argued below that the Delaware Nation gave up any claim it may otherwise have had to land in Pennsylvania in Article III of the treaty with the United States known as the Treaty of Greeneville of August 3, 1795, 7 Stat. 49. Because the district court dismissed Petitioner's claim on other grounds, it did not address the Treaty of Greeneville, nor did the court of appeals. *See* Pet. App. 9a n.8.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David F. B. Smith
Counsel of Record
Ryberg and Smith L.L.P
1054 Thirty-first Street, N.W.
Suite 300 Washington, DC 20007
(202) 333-4000

Counsel for Binney & Smith, Inc., the Follett Corporation, and Carol A. Migliaccio

Darryl J. May
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street.
Philadelphia, PA 19103-7599
(215) 864-8103

Counsel for Binney & Smith, Inc., Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner

Blair H. Granger
Blair H. Granger & Associates, P.C.
1800 East Lancaster Avenue,
Paoli, PA 19301
(610) 640-7500

Counsel for Binney & Smith, Inc., the Follett Corporation, and Carol A. Migliaccio

Dated: October 2006